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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

STAUFFER CHEMICAL COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

Cases: Page

American Medical International, Inc. v. *Secretary of HEW*, 677 F.2d 118 ..... 9, 10
Bunker Hill Co. v. *EPA*, 658 F.2d 1280 2
Commissioner v. *Sunnen*, 337 U.S. 591 10
Consumer Product Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 20
Continental Can Co. v. *Marshall*, 603 F.2d 590..... 10, 11
Marshall v. *Barlow's, Inc.*, 436 U.S. 307 ..... 8, 12
Michigan v. *Long*, No. 82-256 (July 6, 1983)..... 6
Montana v. *United States*, 440 U.S. 147 .....2, 4, 6, 7, 11
Morrison-Knudsen Construction Co. v. *Director, OWCP*, No. 81-1891 (May 24, 1983) 16
Parklane Hosiery Co. v. *Shore*, 439 U.S. 322 ..... 6, 7
Starker v. *United States*, 602 F.2d 1341 10
Stauffer Chemical Co., In re, 14 Env't Rep. Cas. (BNA) 1737, aff'd, 647 F.2d 1075 .....4, 8, 12
True Drilling Co. v. *Donovan*, 703 F.2d 1087..... 10
Union Carbide Corp. v. *Commissioner*, 671 F.2d 67 11
United States v. *Clouston*, 623 F.2d 485 12
United States v. *ITT Rayonier, Inc.*, 627 F.2d 996.. 10
United States v. *Tingey*, 30 U.S. (5 Pet.) 114..... 17

Constitution and Statutes:

U.S. Const. Amend. IV 12
Clean Air Act, 42 U.S.C. (Supp. V) 7401 *et seq.*:
§ 114(a)(2), 42 U.S.C. (Supp. V) 7414(a)(2) ..... *passim*
§ 114(c), 42 U.S.C. (Supp. V) 7414(c) 15, 16
§ 114(d), 42 U.S.C. (Supp. V) 7414(d) 17, 18
§ 206(a), 42 U.S.C. (Supp. V) 7525(a)..... 19
§ 206(b), 42 U.S.C. (Supp. V) 7525(b)..... 19
§ 206(c), 42 U.S.C. (Supp. V) 7525(c) 18, 19
§ 208, 42 U.S.C. (Supp. V) 7542 18
Solid Waste Disposal Act, 42 U.S.C. (& Supp. V) 6901 *et seq.*:
§ 3001(b)(3)(B)(ii)(II), 42 U.S.C. (Supp. V) 6921(b)(3)(B)(ii)(II) 15
§ 3007(a), 42 U.S.C. (Supp. V) 6927(a)..... 15, 16

Constitution and Statutes—Continued: Page

§ 3007(b)(1), 42 U.S.C. (Supp. V) 6927(b)(1) 15, 16
§ 3007(b)(2), 42 U.S.C. (Supp. V) 6927(b)(2) 15
Trade Secrets Act, 18 U.S.C. 1905 15
5 U.S.C. 3109(b) 17
18 U.S.C. 3105 12
41 U.S.C. (Supp. V) 401 17
41 U.S.C. (Supp. V) 503 17
41 U.S.C. (Supp. V) 506 17

Miscellaneous:

48 Fed. Reg. 37110 (1983) 18
Restatement (Second) of Judgments (Tent. Draft No. 2, 1975) 7
Restatement (Second) of Judgments (Tent. Draft No. 4, 1977) 10
Restatement (Second) of Judgments (1982) 3, 7, 10
Second Supplemental Appropriations for Fiscal Year 1971: Hearing on H.R. 8190 Before the Senate Comm. on Appropriations, 92d Cong., 1st Sess. (1971) 17
Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Act Amendments of 1970* (Comm. Print 1974) .. 18-19

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I

Our threshold argument in this case is that the United States may not be collaterally estopped from litigating a question of statutory interpretation governing the relationship between a federal agency and members of a large class of businesses subject to the agency's jurisdiction by the judgment, rendered by the court of appeals for a different circuit, in a different case involving the same private party but arising from an unrelated transaction. As in No. 82-849, *United States* v. *Mendoza*, the respondent has not taken issue with our central contentions.[1] The thrust of respondent's answering argument instead is that our analysis, while applicable in other

[1] Copies of our opening brief and reply brief in *Mendoza* have been provided to respondent.

contexts, should not prevail where collateral estoppel is being used defensively by a party to the prior suit (Resp. Br. 25-26).

The distinction drawn between defensive and offensive use of collateral estoppel is, we submit, unsound (see pages 6-9, *infra*). In addition, the amorphous "balancing calculus" that the respondent proposes (Br. 25) to govern the scope of the expansive collateral estoppel doctrine it favors is incapable of providing the certainty and foreseeability of outcome that is necessary if judicial economy is to be achieved in governmental litigation.[2] Adoption of the rule advocated by respondent would, instead, foster protracted litigation concerning the various factors that enter the balancing process. By contrast, application of traditional rules of stare decisis, coupled with due regard for an analytical force of the decisions of sister courts, will promote efficient resolution of recurring legal controversies. In this case, for instance, the conflicting decisions of the Ninth and Tenth Circuits neatly framed the considerations to be addressed by the Sixth Circuit. Artificially elevating one of these two decisions above the other did not actually yield any judicial economy.

1a. Respondent claims (Br. 20-25), initially, that this case is governed by the "same 'demand'" doctrine that limits the "unmixed questions of law" exception to the doctrine of collateral estoppel, arguing that, as in *Montana* v. *United States*, 440 U.S. 147, 162-163 (1979), the "legal demands" of *Stauffer I* and *Stauffer II* were "closely aligned in time and subject matter." As we explained in our opening brief (at 15-22), however, while considerable uncertainty attends the "same 'de-

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[2] We think it telling that respondent is unwilling to take an unequivocal position on the elementary hypothetical question we have posed: whether EPA is bound by *Stauffer I* to disregard the law of the Ninth Circuit established in *Bunker Hill Co.* v. *EPA*, 658 F.2d 1280 (1981), in dealing with Stauffer's plants located in the Ninth Circuit. See Resp. Br. 30 & n.29.

mand' " rule, it necessarily is limited to circumstances in which the successive cases are alike in material respects in addition to the underlying legal issue. Respondent claims (Br. 21-22) that *Stauffer I* and *Stauffer II* were alike in material respects and argues that the distinguishing features we have noted (U.S. Br. 17-18) lack legal significance. In our view, the situation is precisely the contrary. Most of the factual similarities adduced by respondent (Br. 22) establish no genuine identity between the cases that goes beyond the question presented itself.[3] Other common features of the two cases are simply irrelevant, for they shed no light upon the pure question of statutory interpretation presented.[4]

Immaterial similarities such as those relied upon by respondent cannot be determinative for purposes of applying the "same 'demand' " rule, lest the unmixed questions of law doctrine be swallowed by its limiting exception. As noted in our opening brief (at 18 n.10), the Restatement (Second) of Judgments (§ 28 illustrations 1 and 2, at 276 (1982)) treats as unrelated "demands" successive personal injury damage actions brought against a municipality by a single plaintiff arising out of separate tortious acts, teaching that a judgment for the municipality on sovereign immunity grounds in the first does not bar the plaintiff from arguing in the sec-

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[3] For example, the facts that EPA had in each case designated the contractor-representative in question as its "representative" for purposes of the pertinent stationary source inspection provisions of the Clean Air Act, and that Stauffer "welcomed" inspection by government employees who accompanied the contractor-representatives, while barring the latter, do not establish any significant identity between the two cases. Rather, without these facts the common legal question simply would not be presented.

[4] *E.g.*, the fact that each case arose out of EPA's overview inspection program; that respondent sought in each case to condition accession to the inspection upon execution of a confidentiality agreement it had prepared; and that the search warrant was issued on an ex parte basis.

ond that sovereign immunity should be rejected. We submit that it should make no difference for this purpose that both actions arose out of traffic accidents involving municipal personnel, or even that both accidents occurred on the same date, and involved a similar kind of alleged negligence. Obviously, none of these factual similarities sheds any light upon the purely legal question whether sovereign immunity should continue to be recognized. In the present case, too, the issue is purely legal in character, and may be determined without regard to the factual context. Moreover, the features that distinguish *Stauffer I* and *II*—their genesis in separate transactions, arising independently through the administrative process, and subject to determination in different courts—underscore the justification for determination of the underlying legal issue on its merits.

b. Respondent also argues (Br. 19, 23, 31) that this case involves deliberate manipulation of forums and timing of litigation so as to enable the agency to relitigate the underlying legal issue. As we have explained (U.S. Br. 20-21, 30), that appears to have been a vice of the government's litigation conduct in *Montana* v. *United States*, *supra*, as it was perceived by the Court. But respondent's claim that such tactics were employed here is utterly without foundation in the record or otherwise. Respondent misrepresents (Br. 23) the import of the *Stauffer I* district court's remark that "EPA's counsel apparently wanted to make this a test case." Relitigation was not, and obviously could not have been, an issue in *Stauffer I*; the *Stauffer I* court plainly meant only to observe that EPA chose to stand firm on its legal position rather than to accede to respondent's insistence that agency employees make the inspection alone. *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737, 1741 (D. Wyo. 1980). Moreover, the district court actually found that the inspection site in *Stauffer I* "was

chosen * * * on the basis of general oversight selection criteria." *Id.* at 1739.

The record in this case similarly suggests only that the inspection that gave rise to this case arose out of the routine operation of EPA's oversight inspection program (Pet. App. 44a-45a). And given the nature of that program, which covers approximately 10% of all major stationary sources of air pollution annually (see U.S. Br. 2 n.1), and the extent of respondent's operations (see U.S. Br. 29 n.14), it would have been surprising if several of respondent's facilities were not subject to oversight inspection within a period of a year.

Respondent nonetheless echoes (Br. 23) Judge Jones' suggestion (Pet. App. 38a) that the maintenance of this case entails deliberate relitigation. But both respondent and Judge Jones ignore the fact that the attempt to inspect respondent's Mt. Pleasant, Tennessee, facility antedated the initial inspection attempt at respondent's Wyoming plant and that this case actually reached the court of appeals on respondent's appeal taken from the district court's decision favoring the government, which was rendered *before* the Tenth Circuit ruled on the merits in *Stauffer I*. And as respondent emphasizes (Br. 8 n.8), there was no predicate for its collateral estoppel claim until the court of appeals ruled in *Stauffer I*.[5] Under respondent's view, the United States apparently was required to single out one of respondent's plants as the subject of a test case, and to immunize all of respondent's other facilities from the agency's uniformly applied interpretation of the Clean Air Act inspection provisions during that litigation, presumably until a ruling had been rendered on the issue by the highest available court. Thus, although this case, like *Montana* itself, involves litigation commenced roughly contemporaneously, that pattern results here from even-handed administration

[5] Thus respondent's collateral estoppel argument seeks, anomalously, to overturn the district court decision below on preclusion grounds not in being when the district court ruled.

of the law as to all similarly situated persons, rather than the seemingly manipulative relitigation disapproved in *Montana*.

2. Briefly stated, our argument is that, unlike its application to issues of law that arise in purely private litigation, invocation of collateral estoppel against the government to preclude determination of a question of law affecting the rights or duties of a class of similarly situated persons would undermine the existing system for evolution of the public law. The result would be to encourage excessive appellate litigation on questions of first impression, while precluding appeal on recurring questions of substantial importance (see U.S. Br. 22-26). Cf. *Michigan* v. *Long*, No. 82-256 (July 6, 1983), slip op. 10 n.8. And we submit that, as applied where there is an identity of parties in successive lawsuits, issue preclusion would foster unequal treatment of persons similarly situated, and compromise the government's salutary practice of seeking certiorari only selectively, in those instances where the Court's traditional criteria for further review appear to be satisfied (see U.S. Br. 26-31). Respondent does not suggest that these considerations are without force. Nevertheless, in the "balancing calculus" respondent proposes (Br. 25), they are claimed to be outweighed by the "defensive" nature of the estoppel applied by the court of appeals (Br. 19-20, 28-31). Neither respondent's general argument nor its characterization of this case as a defensive application of collateral estoppel withstands examination.

a. Contrary to respondent's argument (Br. 19-20), while offensive use of collateral estoppel stands, in certain respects, on a less favored footing than its defensive counterpart, see *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329-331 (1979), it does not follow that the law embodies an uncritical preference for defensive applications.[6]

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[6] In its "defensive" application collateral estoppel bars "a plaintiff * * * from asserting a claim that the plaintiff had previously

To be sure, *Parklane Hosiery* reviews in some detail particular circumstances that create a special potential for unfairness in offensive applications of collateral estoppel. The Court held that when any of these circumstances—or any other factor—actually produces unfairness in any given case, offensive issue preclusion is not to be permitted. *Id.* at 331. But the detailed discussion in *Parklane Hosiery* of the hazards of offensive collateral estoppel is merely an application of the general rule, equally applicable to defensive uses, that collateral estoppel should not be applied where "special circumstances warrant an exception to the normal rules of preclusion." Compare *Montana* v. *United States*, 440 U.S. at 155, with *Parklane Hosiery Co.* v. *Shore*, 439 U.S. at 331. Thus no general rule uncritically favoring collateral estoppel in defensive uses can be extracted from *Parklane Hosiery*; nor need unfairness resulting from such use be countenanced on the authority of that case.[7]

Rather than mechanical reliance upon labels such as "offensive" and "defensive," *Montana* and *Parklane Hosiery* require examination of the actual effect of issue preclusion in a particular class of cases. That is precisely what we have done here by focusing attention upon the unique dynamics of government litigation on recurring issues of law and the inequity that would result from issue preclusion in these circumstances. Respondent answers

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litigated and lost against another defendant." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979). In its "offensive" use "a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff." *Ibid.*

[7] In *Parklane Hosiery*, the Court described its approach as "essentially" that of the Restatement "which recognizes that 'the distinct trend if not the clear weight of authority is to the effect that there is no intrinsic difference between "offensive" as distinct from "defensive" issue preclusion * * *.'" 439 U.S. at 331 n.16, quoting Restatement (Second) of Judgments § 88 reporter's note at 99 (Tent. Draft No. 2, 1975) (presently Restatement (Second) of Judgments § 29 reporter's note at 299 (1982)).

(Br. 28-31) that application of collateral estoppel is required in the circumstances of this case to avoid unfairness to it. But that argument rests almost entirely upon its unsupported claim that this case involves manipulative relitigation. See pages 4-6, *supra*. In addition, respondent urges (Br. 29-30) that collateral estoppel will not produce inequity among similarly situated persons in this case, because the Sixth Circuit went on to reach the merits here. But that is true only because of the unusual dual holding of the court of appeals, which is the product of the court's failure to follow its collateral estoppel holding to its logical conclusion, rather than a result of collateral estoppel itself.

b. In any event, it is far from clear that this case is properly regarded as a defensive application of collateral estoppel. *Stauffer I* actually arose on respondent's motion to quash. See 14 Env't Rep. Cas. at 1737. And this case arose upon the concurrent filing of respondent's motion to quash and the government's contempt application (see Pet. App. 2a, 44a). Plainly it would be arbitrary for collateral estoppel purposes for anything to turn upon the fact that one party or the other won the race to the courthouse to initiate adversary proceedings. See Resp. Br. 24 n.22. Of course, the government first sought the assistance of judicial process in each case by securing search warrants when respondent refused entry to the designated contractor-representatives, and the government "triggered" the entire dispute when it undertook oversight inspections of respondent's facilities. But even if these actions could be regarded as the functional equivalent of initiation of litigation, they do not entail harassment through redundant litigation such as collateral estoppel is intended to restrain. As we have already explained, this case results from even-handed application of the law to all persons similarly situated, rather than from any design to relitigate. Cf. *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320-321 (1978). Indeed, only by affording respondent special treatment, unavailable to

those in a comparable position, could the government have avoided the claim of relitigation. Accordingly, whatever label may be applied to the preclusion doctrine as applied in this case, the policies that underlie the doctrine have no application here.

c. Petitioner also urges (Br. 25-28) that the identity of parties in this case and *Stauffer I* requires preclusion. Petitioner largely ignores our arguments on this score (U.S. Br. 27-31). One point should be emphasized, however. In this instance, respondent does not hesitate to follow its argument to its logical conclusion, urging (Br. 32) that the government should have sought certiorari in *Stauffer I* at the time of the court of appeals' decision in that case, notwithstanding the fact that the case did not then meet the conventional criteria for review in this Court, and that other cases certain to affect the justification for further review were at that moment pending before the Ninth and Sixth Circuits. Respondent does not, however, indicate whether this Court should be expected to alter its traditional criteria for certiorari to accommodate review in these circumstances, or, if not, what effect then would be given to the denial of certiorari that would in all likelihood have resulted (see U.S. Br. 25 n.13). The expansive application of collateral estoppel respondent advocates has the potential considerably to disrupt this Court's certiorari practices.

d. Respondent claims that the decision of the court of appeals is consistent with the thrust of appellate case law. (Br. 23-24, 27-28). We disagree. With one exception, the cases upon which respondent relies simply reflect no consideration of the unique dynamics of government litigation that require limitation of issue preclusion. The exception is *American Medical International, Inc.* v. *Secretary of HEW*, 677 F.2d 118, 121-124 (D.C. Cir. 1981), which holds that estoppel is *not* to be applied so as to preclude litigation of recurring questions of public law. As respondent notes (Br. 27), the court declined to extend that reasoning to litigation between the parties to a prior action concerning the issue previously decided ad-

versely to the government. 677 F.2d at 124 & n.46. But the court did not apply estoppel against the government in favor of the particular party that had previously litigated the recurring issue because to do so would have required unequal treatment of similarly situated parties. Contrary to respondent's claim (Br. 27 n.25), the reasoning supporting that disposition was not limited to parties that are subsidiaries of a single corporate entity. Rather, the court's reasoning was unqualified (677 F.2d at 124, quoting Restatement (Second) of Judgments § 68.1, at 33 (Tent. Draft No. 4, 1977)[8]):

> The consensus of the legal profession is that "[r]efusal of preclusion is ordinary justified if the effect of applying preclusion is to give one person a favored position in current administration of the law."

The District of Columbia Circuit emphasized that "[c]ollateral estoppel 'is not meant to create vested rights in decisions . . . thereby causing inequities among [similarly situated parties].'" 677 F.2d at 124, quoting *Commissioner* v. *Sunnen*, 337 U.S. 591, 599 (1948). Thus, the only case cited that directly addresses the arguments raised here rejects respondent's position.[9]

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[8] Presently Restatement (Second) of Judgments § 28 comment c at 278 (1982).

[9] Other cases cited by respondent, even if correctly decided, are also distinguishable in other respects. *United States* v. *ITT Rayonier, Inc.*, 627 F.2d 996 (9th Cir. 1980), entailed a fact-bound question that had no application to other parties: the interpretation of a particular state-issued pollutant discharge permit. *Continental Can Co.* v. *Marshall*, 603 F.2d 590 (7th Cir. 1979), also involved a fact-bound question: the economic feasibility of particular noise reduction devices for a particular class of manufacturing equipment. 603 F.2d at 594-595. Moreover, because the ensuing cases all arose in the same forum as the initial one, the Occupational Safety and Health Review Commission, many of the considerations relevant here had no application. Finally, the result in *Continental Can* appears to rest upon a "pattern of harassment of a particular employer." *True Drilling Co.* v. *Donovan*, 703 F.2d 1087, 1092 (9th Cir. 1983). *Starker* v. *United States*, 602 F.2d 1341 (9th Cir. 1979),

II

Respondent's arguments on the underlying question of statutory interpretation generally recapitulate the court of appeals' analysis and thus are addressed in our opening brief. Several points raised, however, warrant additional comment.

1a. Respondent seriously distorts the question presented for decision, by suggesting that this case concerns the "power [of] private contractors to force entry" into private premises (Br. 48) or to obtain search warrants and execute them (Br. 45-47). The issue decided by the court of appeals and the one we have presented for review in this Court is whether a formally designated contractor-representative of the EPA Administrator may qualify as the "authorized representative" of the Administrator for purposes of Section 114(a)(2) of the Clean Air Act, that is, to enter the premises of an operator of an air pollution source for the purpose of "sampl[ing] any [regulated] emissions." This question is purely one of statutory interpretation, and concerns only the identity of the persons who may carry out monitoring and inspection tasks of a technical nature.

Our submission is that the language and legislative history of the statute allow for the use of such contractor-representatives. By contrast, questions as to who may go into court to seek a warrant to enforce the right of inspection conferred by Section 114(a)(2) when admission has been denied to a properly authorized agent of the

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appears to rest on the court's perception that the successive cases presented a fact-bound question, arose out of related and indistinguishable transactions, and entailed deliberate relitigation of the kind condemned in *Montana*. 602 F.2d at 1343-1348. (We believe that *Starker* gives improper weight to an unappealed district court decision in a case involving a different party, and mischaracterizes the relationship between the successive cases considered.) *Union Carbide Corp.* v. *Commissioner*, 671 F.2d 67 (2d Cir. 1982), may be said to conflict with the position we urge here. But that decision, like the others upon which respondent relies, reflects no consideration of the arguments advanced here.

EPA Administrator, and who may execute such a warrant by presenting it to the operator of a source subject to inspection, are not addressed by Section 114(a)(2) or by any other provision of the Clean Air Act. Indeed, Section 114(a)(2) makes no mention at all of any warrant requirement for inspection. Cf. *Marshall* v. *Barlow's, Inc.*, 436 U.S. at 317 n.12. Rather, these questions, which are not part of this case, are governed by general considerations of reasonableness embodied in the Fourth Amendment.[10]

EPA has never claimed that contractor-representatives are authorized to secure warrants to enforce the statutory right of entry. Such a procedure would be contrary to traditional practices respecting issuance of warrants, and might well be deemed unreasonable; such a procedure was not employed in this case (see Pet. App. 7a, 44a) or in *Stauffer I*. See 14 Env't Rep. Cas. at 1738-1739. Similarly, EPA does not claim that a warrant authorizing entry may be executed by a contractor-representative; although we do claim that such a representative may accompany the executing official. But once entry pursuant to a warrant has properly been gained, Section 114(a)(2) provides that the "authorized representative" of the EPA administrator may conduct inspections and monitoring; nothing in the statute limits the technical aspect of the inspection to full-time EPA employees.

In this case, of course, no conceivable question arises as to the manner of formal execution of the warrant, for the warrant explicitly prescribed that the right of entry was to be afforded to "EPA, through its duly authorized full-time employees, and accompanying, authorized representatives under contract with EPA, * * * for the purpose of conducting an inspection, sampling, and monitoring pursuant to Section 114 of the Clean Air Act" (Pet. App.

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[10] See also 18 U.S.C. 3105, which authorizes private persons to assist government officials in executing a search warrant. See *United States* v. *Clouston*, 623 F.2d 485, 486-487 (6th Cir. 1980) (telephone company employees' technical assistance to federal agents in executing search warrant held proper).

45a n.1). Moreover, when respondent actually denied entry to the agency's designated contractor-representative, the representative was accompanied by an EPA official (Pet. App. 7a). Thus respondent's claim that this case entails consideration of the reasonableness of procedures employed to secure or execute search warrants is spurious. Because these aspects of any entry are controlled by a body of law distinct from Section 114(a)(2)—including the reasonableness requirements of the Fourth Amendment as applied in the routine administrative search context—there is no basis for reading traditional limitations regarding search warrants into Section 114(a)(2)'s explicit grant of authority to carry out technical monitoring.

b. While the common law tradition respecting execution of warrants rehearsed by respondent (Br. 45-47) may have some bearing upon the assessment of the reasonableness of the manner of execution of a warrant (but see page 12 note 10, *supra*), respondent has adduced no evidence that this factor influenced Congress in formulating the inspection provisions of the Clean Air Act. Moreover, there is no basis for respondent's assertion (Br. 47) that Congress would have explicitly sanctioned use of contractor-representatives had it approved their use, for contractor participation in emissions monitoring bears no resemblance to private assistance in an ordinary search. The most telling indication that Congress made no connection between emissions monitoring and conventional searches, of course, is that there is no explicit provision for issuance of search warrants (or for dispensing with them) in Section 114(a)(2). In addition, the duties assigned to contractor-representatives are exclusively those requiring technical expertise. They do not entail exploratory rummaging such as might trigger the special privacy concerns associated with searches for evidence of crime. Rather, Section 114(a)(2) itself carefully limits the scope of any inspection to examination of particular records and monitoring equipment that a plant

operator is required to maintain for purposes of the Clean Air Act, and sampling of regulated emissions.

c. There is no reason to ignore Congress's express determination that inspection and monitoring of regulated emissions may be undertaken by any "authorized representative" of the Administrator. It is entirely irrelevant that another federal agency that is authorized to employ "authorized representatives" to undertake inspections of one kind or another allegedly does not employ designated contractor representatives (see Resp. Br. 47-48). The practices of agencies other than EPA are outside the record of this case, may rest on statutory language or legislative history pertinent to those agencies' work that is not germane here, and, in any event, reflect no legal conclusion about the scope of those agencies' authority. Indeed, it is most likely that diverse agency practices simply reflect the special needs arising from the particular statutory responsibilities of the various agencies. For instance, while mine safety inspectors undoubtedly require in depth technical knowledge, neither they nor any other agencies are likely to require the breadth of specialized knowledge required of EPA's representatives engaged in air pollution monitoring (see U.S. Br. 45-46).[11]

2. Respondent continues to rely upon the provisions of other statutes to attribute to Congress the intent to restrict inspections under Section 114(a)(2), even though there is no evidence that Congress was influenced by the considerations respondent hypothesizes. For instance, respondent adduces no direct evidence that Congress

[11] Respondent emphasizes (Br. 48 n.57) the absence from statutory grants of inspection authority to other agencies, of language comparable to the broad grant of authority to "authorized representatives" found in Section 114(a)(2). But the inference properly to be drawn, we submit, is simply that Congress knows how to limit inspection authority to government employees when it wishes to do so, and that each statute should be interpreted in conformity with its language.

tailored the inspection provisions of the Clean Air Act in response to concerns about the adequacy of confidentiality protections covering government contractors. Instead, respondent points (Br. 49) to the 1980 Solid Waste Disposal Act Amendments that imposed criminal penalties upon persons (such as government contractors) that are not subject to the Trade Secrets Act, 18 U.S.C. 1905.[12] But even if it could be inferred that this change was prompted by a simultaneous amendment intended to make clear that the EPA administrator's inspection authority under the Solid Waste Act extends to contractors (see U.S. Br. 43-44), it would not follow that the absence of a similar provision from the Clean Air Act reflects Congress's intention to preclude use of contractors under that Act.

First, respondent cannot gainsay the fact that Section 114(a)(2) employs precisely the language ("representative" of the EPA Administrator) that is employed in the Solid Waste Act inspection provisions to include contractor representatives among those authorized to conduct inspections. Second, it is clear beyond cavil that Congress did not deem it necessary to provide for criminal liability for contractor-representatives in every situation in which disclosure of confidential information to such persons was authorized. For instance, Congress provided criminal penalties under the Solid Waste Disposal Act for improper disclosure of confidential information by "representatives" by amending the public availability provisions of that Act, 42 U.S.C. (Supp. V) 6927(b)(1) and (2), which authorize disclosures even of confidential information to "other officers, employees, or authorized representatives of the United States." The public availability provisions of the Clean Air Act, Section 114(c), 42 U.S.C. (Supp. V) 7414(c), however, are identical to those

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[12] Although respondent cites 42 U.S.C. (Supp. V) 6921(b)(3)(B)(ii)(II), the directly pertinent provision is evidently 42 U.S.C. (Supp. V) 6927(b)(2).

of the Solid Waste Act, in all relevant respects, except for the absence of any special criminal penalty provisions for improper disclosures by persons not subject to the Trade Secrets Act (see U.S. Br. 34-35).

Thus, although Congress plainly knew that Section 114(c) (like 42 U.S.C. (Supp. V) 6927(a) and (b)(1)) authorizes disclosures to designated contractor-representatives performing duties under the Act, it has not seen fit to impose a similar regime of criminal penalties.[13]

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[13] Respondent continues to argue (Br. 39-42) that Section 114(c) of the Clean Air Act does not shed any light upon the proper construction of Section 114(a)(2). But as the court has recently reiterated, "a word is presumed to have the same meaning in all subsections of the same statute." *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, No. 81-1891 (May 24, 1983), slip op. 9. Thus the term "representative" in Section 114(a)(2), as in Section 114(c), presumptively includes persons other than employees and officers.

It is irrelevant for this purpose, moreover, that Section 114(c) embraces "authorized representatives of the United States" rather than only "authorized representative[s]" of the EPA Administrator. While the former term may be broader than the latter, the difference is not germane here, for the contractor-representatives at issue are authorized representatives of the Administrator. And the difference between the two provisions does not in any way negate the fact that "authorized representatives" (of the United States) under Section 114(c) includes persons other than "officers [or] employees" (of the United States). Thus respondent's suggestion (Br. 40) that the broad formulation of Section 114(c) was designed to encompass *employees* of federal agencies other than EPA simply misses the mark (see U.S. Br. 35 n.21). Respondent now suggests (Br. 40) that "authorized representatives of the United States" may also include certain state officials. But if "authorized representatives" need not be employees of the United States, and may be state officials, who are the agents in fact of the Administrator, but who are not subject to the Trade Secrets Act, there is no statutory basis for excluding duly designated contractor-representatives either. We note that the court of appeals did not embrace respondent's limiting construction of Section 114(c) (see Pet. App. 21a-22a).

Contrary to respondent's speculation (Br. 49-50) then, Congress's action in amending the Solid Waste Disposal Act in 1980 does not reflect a conclusion that the available safeguards against improper contractor disclosure (see U.S. Br. 46-47) are necessarily inadequate. Accordingly, the mere absence from Section 114(a)(2) of criminal penalties for unauthorized disclosure by contractor-representatives cannot support the artificial constriction of that grant of authority for which respondent argues. Respondent's argument that additional sanctions are needed for any contractor breaches of confidentiality should be directed to Congress.

3. Respondent appears to suggest (Br. 44 n.48) that EPA lacks statutory authority to retain contractor-representatives for purposes of Section 114(a)(2) of the Clean Air Act. But the authority of the Executive Branch to contract for services needed to fulfill statutory responsibilities is an inherent attribute of the sovereignty of the United States. *United States* v. *Tingey*, 30 U.S. (5 Pet.) 114, 127 (1831). See also 5 U.S.C. 3109(b);[14] 41 U.S.C. (Supp. V) 401, 503 and 506. Plainly, EPA's expenditure of agency funds for contractor-representatives is authorized by Congress. See, *e.g.*, *Second Supplemental Appropriations for Fiscal Year 1971: Hearings on H.R. 8190 Before the Senate Comm. on Appropriations*, 92d Cong., 1st Sess. 1625-1626 (1971).[15]

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[14] Section 3109(b) provides authority to the head of any federal agency to "procure by contract the temporary * * * or intermittent services of experts or consultants or an organization thereof," subject only to the condition that the expenditures be "authorized by an appropriation." It does not, as respondent asserts, require separate authorizing legislation for the use of a consultant or expert.

[15] Respondent's reliance (Br. 44 n.48) on OMB Circular No. A-76 is misplaced. First, there is no evidence that Congress had that document in mind when it framed Section 114(a)(2). Moreover, EPA contractor-representatives perform only technical tasks and do not engage in "regulation" or other "inherently governmental" functions. We note that respondent's approach to Section 114(a)(2) conflicts with its approach to Section 114(d). Respondent derides (Br. 39 n.38) our suggestion (U.S. Br. 36-37) that the Executive

4. We have already discussed (U.S. Br. 39-42) respondent's contention (Br. 33-36) that the legislative history of the Clean Air Act discloses Congress's intention to restrict the term "authorized representative" employed in Section 114(a)(2) to employees of the EPA. We have contrasted (Br. 41) the automobile plant inspection provisions of the Clean Air Act §§ 206(c) and 208, 42 U.S.C. (Supp. V) 7525(c) and 7542, which limit inspection authority to agency employees, with Section 114(a)(2), the stationary source inspection provision, which uses the more inclusive term, "the Administrator or his authorized representative." Suggesting that the difference in language is to be disregarded (Br. 35 & n.34), respondent asserts that the Conference Report on the 1970 Clean Air Act Amendments indicates that the House and Senate versions of the auto plant inspection provisions, which differed in the same respect, nonetheless were "essentially the same." But the passage upon which respondent evidently relies describes not the automobile plant inspection provisions of the two bills, but the provisions governing prototype and production line testing.[16] The only reference to the auto plant inspection provisions in the Con-

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Branch might responsibly exercise its authority to act through Section 114(d), yet is quick to assume that in framing Section 114(a)(2) Congress knew of, and relied upon, the OMB Circular No. A-76, which reflects such Executive self-restraint. We note also that OMB Circular No. A-76 has recently been reviewed to require governmental agencies to consider whether functions that are not essentially governmental in nature could more efficiently be performed by the private sector pursuant to federal contracts than by full time governmental employees. See 48 Fed. Reg. 37110 (1983).

[16] The passage in question states:

> The provisions of the House Bill, and the Senate Amendment revising the procedure under existing law *for prototype testing and authorizing production line testing of new vehicles and engines were essentially the same*, except that the Senate Amendment requires compliance testing of each vehicle prior to delivery.

Staff of Senate Comm. on Public Works, 93d Cong., 2d Sess., *A Legislative History of the Clean Air Amendments of 1970*, at 200

ference Report simply tracks the statutory language chosen without making any comment on the differing language of the underlying bills.[17] Thus, the Conference Report does not equate "authorized representatives" with "officers and employees."

Respondent also points (Br. 35-36) to three unrelated, unenacted, provisions of the Senate's version of the 1970 Clean Air Amendments that employ the term authorized representative in contexts that suggest that agency employees were contemplated. Obviously, when the statutory context requires such a limiting construction—as where "authorized representative" is employed interchangeably with "officer or employees," or an "authorized representative" is characterized as located "in" an agency "field office" for a particular region—a statute should be interpreted accordingly. But respondent can point to no such limiting language in Section 114(a)(2). Moreover, Section 114(c) of the Clean Air Act as enacted is a telling indication that Congress did not regard the term "authorized representative" as synonymous with "officer or employee." See page 16 note 13, *supra*. Respondent also continues to ignore the role of Executive prudence in determining when a function may appropriately be performed by personnel retained under contract. See pages 17-18 note 15, *supra*.

5. Our reasons for rejecting respondent's reliance (Br. 36-38) upon the legislative history of subsequently enacted provisions of the Clean Water Act have already been stated (U.S. Br. 42-43). We have noted the unreliability of post-enactment legislative history generally, and offered as an illustration the characterization of Section 114 of the Clean Air Act in the Senate report on a

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(Comm. Print. 1974) (*Leg. Hist.*). Thus the Conference Report language was directed at the present Section 206(a) and (b) (42 U.S.C. (Supp. V) 7525(a) and (b)) rather than the inspection provision, Section 206(c) (42 U.S.C. (Supp. V) 7525(c)).

[17] "The Administrator's employees may conduct plant inspections or inspect records upon presentation of appropriate credentials." *Leg. Hist.* 201.

"Superfund" bill, which is diametrically opposed to the characterization of the same provision found in the Senate Report on the 1972 Clean Water Act upon which respondent relies. Respondent replies (Br. 38 n.37) that the Senate version of the Superfund bill was not enacted, and that a single Senator subsequently wrote to the Administrator disavowing the view expressed in the report in question. We note, preliminarily, that such expressions of individual views—even when directed to pending legislation and stated publicly before the Congress—are entitled to little weight. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 & n.13 (1980). *A fortiori*, in the circumstances here, Senator Simpson's letter cannot be taken as a reflection of Congress's intent in enacting Section 114(a)(2) of the Clean Air Act.[18] More to the point, however, respondent's reply is misdirected, for it is not our contention that the 1980 Senate Report should be regarded as authoritative evidence of the meaning of Section 114(a)(2). Rather, we invoke the 1980 report simply to underscore that after-the-fact legislative history of separate legislation such as that which respondent relies upon does not afford any reliable basis for limiting the plain language of Section 114(a)(2). Senator Simpson's letter surely does not detract from our point.

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

OCTOBER 1983

[18] Respondent's further claim (Br. 38 n.37) that provisions of the enacted Superfund Act are not modeled after the Clean Air Act is an irrelevancy. The pertinent passage in the Senate report on the forerunner bill (U.S. Br. 42-43) is a characterization of the Clean Air Act inspection provision, not merely a description of the proposed Superfund bill.

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